

JAMES PAUL GILMORE, JR.,

Petitioner,

vs.

JEANNE WOODFORD,

Respondent.

ORDER GRANTING REQUEST  
FOR EXTENSION OF TIME;  
GRANTING MOTIONS TO  
PROCEED IN FORMA  
PAUPERIS; ORDER TO SHOW  
CAUSE WHY PETITION  
SHOULD NOT BE DISMISSED  
FOR FAILURE TO EXHAUST  
STATE REMEDIES

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the calculation of his custody credits pursuant to his parole revocation. Petitioner has filed a request for extension of time to submit his in forma pauperis application and two motions to proceed in forma pauperis. Petitioner has provided documentation of his attempts to exhaust his claim through the administrative appeal process. However, Petitioner does not state that he presented his claims to the California Supreme Court prior to filing the instant petition. The Court will GRANT Petitioner's request for extension of time (docket no. 4) and GRANT Petitioner's motions to proceed in forma pauperis (docket nos. 2, 5).

1 The Court will order Petitioner to show cause why the petition should not be dismissed  
2 without prejudice because he has not exhausted his state court remedies prior to filing the  
3 instant petition.

#### 4 **STATEMENT**

5 The instant petition was filed on June 8, 2006. Petitioner challenges the California  
6 Parole Board's authority to extend his term of confinement based upon his parole  
7 revocation and the calculation of his custody credits. Petitioner has provided  
8 documentation of his first level of appeal in the prison administrative appeal process.  
9 However, Petitioner does not allege that he presented any of his claims to the California  
10 Supreme Court prior to filing this habeas action. See Petition at 3-9.

#### 11 **DISCUSSION**

12 Prisoners in state custody who wish to challenge collaterally in federal habeas  
13 corpus proceedings either the fact or length of their confinement are first required to  
14 exhaust state judicial remedies, either on direct appeal or through collateral proceedings,  
15 by presenting the highest state court available with a fair opportunity to rule on the merits  
16 of each and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b)-(c); see  
17 also O'Sullivan v Boerckel, 119 S.Ct 1728, 1730 (1999) (state's highest court must be  
18 given opportunity to rule on claims even if review is discretionary); Larche v Simons, 53  
19 F.3d 1068, 1071-72 (9th Cir. 1995) (Supreme Court of California must be given at least  
20 one opportunity to review state prisoners' federal claims). The exhaustion requirement  
21 applicable to federal habeas petitions is not satisfied if there is a pending post-conviction  
22 proceeding in state court. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983).  
23 If, for example, an appeal of a state criminal conviction is pending, a would-be federal  
24 habeas petitioner must await the outcome of his appeal before his state remedies are  
25 exhausted, even where the issue raised in the petition has been finally settled in the state  
26 courts. Id. Petitioner cannot present claims to this Court which he has not first raised in  
27 the highest state court available, the California Supreme Court, usually by filing a petition  
28

1 for review or a state habeas petition.

2 Here, Petitioner has not alleged that he presented his claims to the state supreme  
3 court prior to filing the instant habeas petition. Accordingly, the Court issues an Order to  
4 Show Cause to Petitioner as to why the petition should not be dismissed without prejudice  
5 to refiling once he has exhausted his claims with the state supreme court. Petitioner shall  
6 file a response within **thirty days** of the date of this order addressing: (1) whether he has  
7 an appeal, habeas petition or other post-conviction proceeding now pending before the  
8 state court; and (2) whether he has presented the claims in the instant petition to the  
9 California Supreme Court. Failure to file a timely response will result in the Court  
10 dismissing the instant petition without prejudice for failure to exhaust state court  
11 remedies.

## 12 CONCLUSION

13 1. Petitioner's request for extension of time to file his in forma pauperis  
14 application (docket no. 4) is GRANTED.

15 2. Petitioner's motions to proceed in forma pauperis (docket nos. 2, 5) are  
16 GRANTED.

17 3. The Court orders Petitioner to show cause why the instant petition  
18 should not be dismissed without prejudice to refiling once he has exhausted his claims  
19 with the state supreme court. Petitioner shall file a response within **thirty days** of the  
20 date of this order addressing: (1) whether he has an appeal, habeas petition or other post-  
21 conviction proceeding now pending before the state court; and (2) whether he has  
22 presented the claims in the instant petition to the California Supreme Court. **Failure to**  
23 **file a timely response will result in the Court dismissing the instant petition without**  
24 **prejudice for failure to exhaust state court remedies.**

25 4. It is Petitioner's responsibility to prosecute this case. Petitioner must keep  
26 the Court and all parties informed of any change of address by filing a separate paper  
27 captioned "Notice of Change of Address."

1 He must comply with the Court's orders in a timely fashion. Failure to do so may result  
2 in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil  
3 Procedure 41(b).

4 IT IS SO ORDERED.

5 DATED: 2/23/07

  
JEREMY FOGEL  
United States District Judge

1 A copy of this ruling was mailed to the following:

2 James Paul Gilmore, Jr.  
3 P-46444  
4 CA State Prison - Avenal  
5 P.O. Box 9  
6 Avenal, CA 93204  
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